



The IAS and its Impact on Caribbean Human Rights Law: Constitutional Law Implications and the Role of the CCJ

The Honourable Mr Justice Winston
Anderson, Judge of the Caribbean Court

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The Inter-American Commission on Human Rights (IACHR) is a principal and autonomous organ of the Organization of American States ("OAS") whose mission is to promote and protect human rights in the American hemisphere. It is composed of seven independent members who serve in a personal capacity. Created by the OAS in 1959, the Commission has its headquarters in Washington, D.C. Together with the Inter-American Court of Human Rights ("the Court" or "the I/A Court H.R."), installed in 1979, the Commission is one of the institutions within the inter-American system for the protection of human rights ("IAHRS")

Paper Presentation

By

The Honourable Mr Justice Winston Anderson¹, Judge of the Caribbean Court of Justice,

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Introduction

The occasion of this Special Lecture hosted by the Students Representative Council of the Hugh Wooding Law School provides a welcome opportunity to consider in broad terms the impact of the Inter-American System (“IAS”) of human rights on Caribbean human rights law with special reference to the constitutional implications and the role of the Caribbean Court of Justice (“CCJ”).

I do think that critical constitutional issues arise from the penetration of the Inter-American Human Rights System into Caribbean law. For whilst it is clear that the Inter-American Human Rights System has effected significant advancement in the regional protection of human rights, it has also, to my way of thinking, raised vital issues of governance that lie at the heart of our Caribbean jurisprudence.

Most critically, the IAS brings into question the doctrine of the supremacy of the Caribbean constitution. I believe that resolving the relationship between the IAS and the doctrine of

¹ * LLB (UWI); CLE (Inns of Court School of Law); PhD (Cantab); Professor of International Law & Judge of the Caribbean Court of Justice. This paper reproduces presentations made at the Seminar of the InterAmerican Commission on Human Rights; the Inter-American Institute of Human Rights; the Norman Manley Law School (“NMLS”) at the NMLS on 9 October 2010; and at the Students Representative Council Special Lecture at the Hugh Wooding Law School on 18 October 2010. I am very grateful to Ms. Radha Permanand, Attorney-at-Law and Deputy Registrar of the CCJ, and Ms. Nikeh Smith, LL.B, for proof-reading an earlier version of this paper. The views expressed by the author are his personal views and do not necessarily reflect those of the Caribbean Court of Justice. Moreover, these views are provisional in that they have not yet benefitted from any forensic argument from Counsel.

constitutional supremacy is of enormous practical and philosophical importance for the Caribbean legal identity.

Outline

In order to develop this thesis in the relatively short space that I have I will say a few words about the IAS. Then, I will look briefly at some of the uncontroversial effects that the IAS has had on our human rights law. Thereafter, I will examine in some detail two recent IAS decisions that appear to be much more invasive, and which, I contend, raise constitutional difficulties. Finally, I will end with a challenge directed at those of you who take the question of defining and guarding the Caribbean legal identity seriously. Within that context I will submit my view with respect to the role of the CCJ for your consideration.

Stipulation

Let me stipulate at the very outset that in addition to inspiring the activity of several human rights organizations in the Caribbean, the Inter-American Human Rights System has had a positive effect on the institutions of governance of our Caribbean societies. The executive, legislative, and judicial branches of government have all been influenced, I believe for the better, by the Inter-American System of Human Rights. This does not remove or reduce, however, the urgent necessity for self-definition by Caribbean law.

Inter-American Human Rights System

When I use the term “Inter-American Human Rights System,” I am referring to the norms and institutions for protecting human rights which have been adopted by the Organization of American States (“OAS”).² There are two main OAS human rights documents: the American Declaration of the Rights and Duties of Man (“American Declaration”) adopted in 1948;³ and the American Convention on Human Rights (“American Convention”) adopted in 1969.⁴ The 35 member states making up the OAS (which include all the member states of the Caribbean Community (“CARICOM”)) have accepted the OAS Charter.

The Inter-American Commission on Human Rights The OAS Charter establishes the Inter-American Commission on Human Rights (“InterAmerican Commission” or “the Commission”) as the principal institution for human rights protection and promotion in the Americas. The main duty of the Commission is to hear and oversee petitions that have been made against a member state of the OAS on the ground of human rights abuse contrary to the American Declaration. The reports and recommendations issued by the Commission are of moral force but are not legally binding.

The Inter-American Commission also monitors the human rights guarantees in the American Convention in respect of those OAS member states that have accepted the Convention. The Commonwealth Caribbean states that have accepted the Convention are: Barbados (1981);

² The Ninth International Conference of American States held in Bogotá, Colombia between March and May 1948 saw the inception of the OAS by virtue of the Charter of the Organization of American States which was signed on 30 April 1948 and came into effect on 13 December 1951. The Charter is *reprinted in* 119 UNTS 3.

³ The American Declaration was adopted at the Ninth International Conference of American States in Bogotá, Colombia also. It is *reprinted in* 43 AJIL Supp. 133 (1949).

⁴ (Adopted 21 November 1969, entered into force 18 July 1978) 1144 UNTS 123, 9 ILM 99 (1969).

Dominica (1993); Grenada (1978); and Jamaica (1978). Trinidad and Tobago withdrew its ratification in 1998 (effective 1999).

The Inter-American Court on Human Rights

The American Convention created the Inter-American Court of Human Rights (“Inter-American Court” or “the Court”). Parties to the American Convention may sign an additional protocol to accept the Court's jurisdiction. In respect of those countries accepting its jurisdiction, the Court is competent to make legally binding decisions on breaches of the civil and political human rights enshrined in the Convention. At present, only Barbados among the Commonwealth Caribbean, has accepted the jurisdiction of the Court. Suriname and Haiti, the two civil law member states of CARICOM, have also accepted the Court’s jurisdiction.

United States of America and Canada

It should be noted that neither the United States of America, nor Canada, arguably the two most advanced democracies in the Americas, has ratified the American Convention. The thinking appears to be that the respective bills of rights in the constitutions of these countries, as interpreted by their courts, provide adequate human rights protection to the citizens of these countries. This perspective could be relevant to the legal systems in the Commonwealth Caribbean where there are comparable constitutional bills of rights and an enviable tradition of judicial assertion of those rights.

Other Treaties and Declarations

The OAS has other treaties and declarations on human rights, such as the Inter-American Convention to Prevent and Punish Torture 1985;⁵ Protocol of San Salvador to the American Convention on Human Rights to Abolish the Death Penalty 1990;⁶ the Inter-American Convention on the Forced Disappearance of Persons 1994;⁷ Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women;⁸ Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities 1994;⁹ and the Declaration on Human Rights and the Environment 2003.¹⁰

Uncontroversial Impacts of IAS on Caribbean Human Rights

Let us now turn to a few brief examples of the impact of the Inter-American System of Human Rights on Caribbean human rights law which, in my view, do not raise any real constitutional problems. These impacts may be seen in judicial decisions as well as in actions taken by the executive and legislature.

⁵ (Adopted 9 December 1985, entered into force 28 February 1987) OAS Treaty Series No. 67 (“Inter- American Torture Convention”).

⁶ (Adopted 8 June 1990, not yet in force) OAS Treaty Series No. 73 (“Protocol to the American Convention on Human Rights to Abolish the Death Penalty”).

⁷ (Adopted 9 June 1994, entered into force 28 March 1996) OAS Treaty Series No. 68, 33 ILM 1429 (1994).

⁸ (Adopted on 9 June 1994, entered into force 3 May 1995).

⁹ (Adopted 7 June 1999, entered into force 14 September 2001) AG/RES. 1608 (XXIX-O/99).

¹⁰ Human Rights and the Environment in the Americas, AG/RES. 1926 (XXXIII-O/03).

Judiciary

Consider for instance, the issue of the mandatory death penalty. In the year 2002, the Eastern Caribbean Court of Appeal (“ECCA”) reflected in *Spence v The Queen*¹¹ and *Hughes v The Queen*,¹² on the issue of whether the mandatory death sentence was contrary to the constitutional prohibition against inhuman and degrading treatment. Departing from established assumptions in the case-law, the ECCA decided that the imposition of a mandatory death sentence for murder was, indeed, unconstitutional.

In coming to this conclusion, the ECCA studied and adopted findings in complaints that had come before the Inter-American Commission and in which the Commission had found the mandatory death penalty to be unlawful because it proscribed individualized sentencing and did not take into account the personal culpability of the accused.

Delivering the landmark leading judgment, Sir Dennis Byron CJ accepted that human rights agreements such as the American Convention could not have the effect of overriding the domestic law or the constitution of the sovereign independent states of the Caribbean. However, the learned Chief Justice also accepted, in the absence of clear legislative enactment to the contrary, that these agreements could be used to interpret domestic provisions, whether in the constitution or statute law, so as to conform to the state’s obligations under international law. Accordingly, he felt able to rely on the jurisprudence developed in the Inter-American Human Rights System to decide the meaning of section 5 of the Constitution of St. Vincent and the Grenadines dealing with inhuman and degrading treatment.

¹¹ (1999) 59 WIR 216 (CA), upheld in [2001] UKPC 35 (PC).

¹² (2002) 60 WIR 156 (CA). The appeal was dismissed in [2002] UKPC 12 (PC).

The Chief Justice said:¹³

Over the past two years the Inter-American Human Rights Commission has been considering the meaning of [the provision against inhuman and degrading treatment] and its impact on the mandatory death penalty in relation to cases coming from the Caribbean. The cases that are relevant to this issue have been *Downer and Tracy v Jamaica* (2000) (unreported), *Baptiste v Grenada* (2000) (unreported), and *Thompson v St Vincent and the Grenadines* (2000) (unreported). I have studied these judgments and conclude that the principles they espouse are consistent with the provisions of s 5 of the Constitution. The principles that have emerged from these cases may be summarised by saying that the death penalty is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. The imposition or application of the death penalty must be subject to certain procedural requirements. It must be limited to the most serious crimes. Consideration of the character and record of the defendant and the circumstances of the offence which may bar the imposition of the penalty should be taken into account.

When *Spence* and *Hughes* went up to the Judicial Committee of Her Majesty's Privy Council ("Privy Council") the approach of the ECCA was expressly affirmed. In fact, the Privy Council also referred with approval to developments in the Inter-American Human Rights System.

In the context of traditional land rights, the Belize Supreme Court decided, in *Cal v Attorney General of Belize*¹⁴ in favour of Mayan traditional title. This was partly because of the findings for the Mayas by the Inter-American Commission, and also because of Belizean obligations to

¹³ *Ibid*, at p. 172, para 41 (CA).

¹⁴ (2007) 71 WIR 110.

indigenous peoples under the OAS Charter. In delivering the judgment in that case, Chief Justice Conteh stated that the Inter-American norms “resonate with certain provisions of the Belize Constitution.”¹⁵ There is every indication that Inter-American standards expounded in *Gleaner Co Ltd and Another v Abrahams*¹⁶ are also influential in constitutional disputes concerned with whether the award of enormous sums in defamation suits could unreasonably stifle the fundamental right of freedom of expression.

Executive and Legislature

Caribbean case-law confirms the impact of the Inter-American Human Rights System on the executive and legislature. It is now settled law that when the report of an international human rights body (such as the Inter-American Commission) or a decision of an international human rights tribunal (such as the Inter-American Court) is available, the local mercy committee must consider it. If the report or decision is not accepted, the mercy committee must explain why.¹⁷ Where the applicant establishes a “legitimate expectation” the mercy committee may be obliged to await the report of the international human rights body before advising on the exercise of the prerogative of mercy.¹⁸ In enacting human rights-related legislation, Caribbean parliaments have demonstrably been sensitive to their commitments and obligations under the Inter-American Human Rights System.¹⁹

¹⁵ *Ibid.* at p. 150, para 118.

¹⁶ (2003) 63 WIR 197, at p. 219, para 64; *See also* IACHR Report No. 23/08, Case 12.468, Dudley Stokes (Jamaica) March 14, 2008.

¹⁷ *Lewis v AG of Jamaica* [2001] 2 AC 50, at p. 79.

¹⁸ *Attorney General v Joseph and Boyce* (2006) 69 WIR 104.

¹⁹ *See e.g.*, Act No. 2 of 1980, and Act No. 10 of 2003, which amend the Constitution of the Co-operative

Recent Inter-American Court Decisions

The interfaces with Inter-American Human Rights Law just outlined appear to be entirely consistent with Caribbean constitutional arrangements. However, two recent decisions of the Inter-American Court in *Boyce and Joseph v Barbados*,²⁰ and *Cadogan v Barbados*²¹ raise more difficult issues. These decisions appear, in my view, to represent impositions into the Caribbean legal system of institutions, traditions, standards, and procedures developed outside of CARICOM. In this way, these cases raise fundamental questions concerning the very foundation of the Caribbean constitutional system.

Boyce and Joseph v Barbados

The case of *Boyce and Joseph v Barbados* has a very impressive genealogy, having been decided by the Privy Council, the CCJ, and Inter-American Court. The litigation arose from the murder on 10 April 1999 of Marquelle Hippolyte. Marquelle was a lad of 22 years who was brutally beaten to death with pieces of wood. Four men in their early twenties (including Boyce and Joseph) were charged with the murder. At the trial,²² two of the accused accepted offers from the prosecution to plead guilty to manslaughter, and each was sentenced to 12 years' imprisonment. Boyce and Joseph refused the offer and, after trial, were found guilty of murder and were both given the

Republic of Guyana, making it more sensitive to international human rights interpretation (*see*: sections 39, 40, 138, 154, 212. *Note, further*, the legislative developments in Barbados which increase to 18 the minimum age that must have been attained by a person at the time he committed murder in order for that person to be eligible for the death penalty: Section 14, Juvenile Offenders Act (Cap. 138) (Barbados).

²⁰ IACHR, November 20, 2007. Series C No. 169.

²¹ IACHR, September 24, 2009. Series C No. 204.

²² (2004) 64 WIR 37.

mandatory death sentence. Their appeal against their conviction and sentence to the Court of Appeal was dismissed.

Privy Council

In the first round of litigation, the appeal by Boyce and Joseph to the Privy Council pressed the argument that section 2 of the Offences Against the Person Act (“OAPA”) under which the mandatory death sentence had been imposed, was unconstitutional in that it was inconsistent with section 15 (1) of the Barbados Constitution which prohibits inhuman and degrading treatment. The Privy Council appeared to agree that section 15 (1) was indeed inconsistent with a mandatory death penalty for murder,²³ but in the end rejected the appellants’ argument because, in the view of their Lordships, section 2 of the OAPA was saved as “existing law” by virtue of section 26 of the Constitution. Further, having been saved in this way, section 26 immunized section 2 of the OAPA from scrutiny by the courts. Accordingly, their Lordships dismissed the appeal.

Caribbean Court of Justice

The second round of litigation began in the Barbados High Court and involved two main issues, namely: (1) whether the procedures of the Barbados Mercy Committee (“local Privy Council”) were open to judicial review; and (2) whether the local Privy Council was obliged to await the outcome of proceedings in the Inter-American Human Rights System before advising the Governor-General on the prerogative of mercy.

Greenidge J dismissed the petitions, but the Court of Appeal reversed the judgment of the learned judge. In particular, the Court of Appeal held that the executive, as the treaty-making organ of the Government, could not ignore treaties accepted by the state and which gave rights to citizens, such

²³ *Ibid*, per Lord Hoffman, delivering the majority judgment, at paras. 25, 27 and 31.

as the right to file petitions under the Inter-American Human Rights System. Also, since it was unrealistic to expect that the Inter-American proceedings initiated by Boyce and Joseph would be concluded within the five-year rule in *Pratt and Morgan v Attorney General of Jamaica*,²⁴ the Court of Appeal commuted the respondents' death sentences and substituted them with terms of life imprisonment.

When the matter came on for decision by the CCJ in 2006, the Attorney-General conceded that even if his appeal against the decision of the Court of Appeal was successful, it would not be appropriate to re-impose the death penalty as more than five years had elapsed since the respondents' conviction and sentence.

For their part my noble and learned brothers on the CCJ affirmed that the procedures employed by the Mercy Committee were amenable to judicial review. Furthermore, the CCJ developed the concept of "legitimate expectation" as the legal basis upon which the American Convention (which had been ratified by Barbados but not incorporated by domestic legislation) could nonetheless give rise to rights to Barbadian citizens enforceable by those citizens in domestic law. In his concurring judgment, Justice Wit agreed that the American Convention was part of Barbadian domestic law but grounded his decision in broader monist principles.

Inter-American Court

From the foregoing, it may have seemed reasonable to assume, by the time of the decision by the Inter-American Court on 20 November 2007, that nothing of substance was left to be litigated.

²⁴ (1993) 43 WIR 340.

Indeed, Barbados argued that the issues were “no longer relevant and ... moot,”²⁵ given the concessions by the state and the decision of the CCJ.

(1) *Was the Inter-American Court litigation moot?*

The Inter-American Court rejected Barbados’ argument that the issues were moot. Quite aside from the question of whether the Mercy Committee was obliged to follow the judicial precedent and commute sentences after 5 years in accordance with *Pratt and Morgan*,²⁶ the Court held that a wider point of principle was involved. The alleged violations of the American Convention by Barbados with regard to the issue of the mandatory death penalty, if proven, would have occurred “at the sentencing stage, when the alleged victims were sentenced to death by hanging pursuant to laws that allegedly contravene the American Convention.”²⁷

Thus, depending on whether the mandatory death sentence was in fact contrary to the American Convention, Barbados would have been in breach from 2001 when Boyce and Joseph had been sentenced to death.

(2) *Was the mandatory death penalty contrary to the American Convention?*

The Inter-American Court had little difficulty in finding that the imposition of the mandatory death penalty was inconsistent with the American Convention. As will be recalled, as much had been suggested in 2000 by the findings of the Inter-American Commission, which were referenced by

²⁵ *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 84.

²⁶ There was some concern that, in one case, the concession was being made on the basis of the expiry of the 5 years under *Pratt and Morgan* rather than a formal commutation of the death sentence; the Court had no way of knowing whether the Mercy Committee would choose to follow the judicial precedent and commute the death sentence. There was, therefore, no legal certainty that the death sentence would not be imposed “unless and until his sentence [was] formally commuted”: *ibid*, at para 20.

²⁷ *Ibid*, at para. 21.

the ECCA in *Hughes and Spence*. Indeed, the Inter-American Court had itself come to a similar conclusion in 2002 in *Hilaire v Trinidad and Tobago*.²⁸

The Court reasoned²⁹ that Article 4 (2) of the American Convention allowed for the deprivation of the right to life by the imposition of the death penalty in those countries that have not abolished the death sentence. However, the Convention also established a number of strict limitations. First, the death penalty must be limited to the most serious crimes; second, the sentence must be individualized in accordance with the characteristics of the crime as well as the degree of culpability of the accused; and third, the procedural guarantees had to be strictly observed. It was clear that the mandatory death penalty fell well short of these benchmark requirements.

(3) The death penalty legislation and the savings law clause

The Inter-American Court next found that section 2 of the OAPA (which imposed the mandatory death penalty) and section 26 of the Constitution (which “saved” the OAPA from being deemed “unconstitutional”) were themselves incompatible with the American Convention. In coming to this conclusion the Court referred³⁰ to Article 2 of the American Convention under which State Parties undertook to adopt “in accordance with their constitutional processes ... such legislative or other measures as may be necessary to give effect to [the] rights or freedoms” enshrined in the Convention. This obligation required adoption “of all measures so that the provisions of the Convention are effectively fulfilled in [the] domestic legal system.”³¹

²⁸ *Case of Hilaire, Constantine and Benjamin et al v Trinidad and Tobago*, IACHR, June 21, 2002. Series C No. 94.

²⁹ *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 50.

³⁰ *Ibid*, at para. 80.

³¹ Further, this obligation meant that states “must also refrain both from promulgating laws that disregard or impede the free exercise of these rights, and from suppressing or modifying the existing laws protecting them”: *ibid*, at para 69, the Court citing the case of *Olmedo-*

The Court chided³² the Privy Council for finding that the OAPA was protected by the savings law clause in the Constitution. In the view of the Inter-American Court, the Privy Council conducted too narrow an examination of the validity of OAPA and the savings law clause. The analysis should not have been limited to the issue of whether the OAPA was unconstitutional.

Rather, the question should have also been whether it was “conventional,” i.e., whether it was consistent with the American Convention. In the view of the Inter-American Court, Barbadian courts, including the Privy Council and now the CCJ, must address not merely the matter of the constitutionality of the law but also whether the law restricts or violates the rights recognized in the American Convention.

(4) Conditions in prison; obligation to wait on IAS; death warrant

The Inter-American Court also found that the conditions in which Boyce and Joseph were detained amounted to inhuman and degrading treatment. In particular, the Court deprecated their lack of privacy; lack of contact with the outside world; lack of exercise; as well as their being kept in “cages” and forced to use slop buckets in plain view of others. These infractions violated the constitutional rights of the respondents to personal integrity.

Further, the Court found that the state was bound to wait for the completion of proceedings before domestic courts and the Inter-American Human Rights System before any warrant of execution may be read and any sentence of death carried out.³³ The reading of the death warrant before both processes had been exhausted would constitute a violation of the condemned men’s right to personal integrity.

Bustos et al v Chile (“The Last Temptation of Christ”) IACHR, February 5, 2001. Series C No. 73, at para. 87.

³² *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 78.

³³ *Ibid*, at paras. 112- 114.

(5) Death by hanging, monetary compensation

The Inter-American Court also considered but found it unnecessary to decide whether the infliction of the death sentence by *hanging* would be in violation of the American Convention.³⁴ Nor did the Court find it necessary to rule on the issue of whether monetary compensation was payable to Boyce and Joseph by Barbados, since no such request was made “in the present case.” These matters, no doubt, will form the bases of future judgments of the Court.

(6) The orders

Finally, the Court made a series of orders. Perhaps most critically, Barbados was ordered³⁵ to adopt such legislative or other measures as necessary to ensure that its Constitution and laws were brought into compliance with the American Convention. Specifically, Barbados was required to remove the immunizing effect of section 26 of the Constitution of Barbados in respect of the saving law clause.

Cadogan v Barbados

This case mirrors many aspects of *Boyce and Joseph*, but the Inter-American Court’s rulings on the duty of the domestic courts are worthy of note. The applicant’s motive was to rob the victim, but he nevertheless armed himself with a 32-centimeters (14-inch) butcher’s knife which had a 25-centimeters (9-inch) blade. The trial judge, the Court of Appeal, and the CCJ all accepted

³⁴ *Ibid*, at para. 85.

³⁵ *Ibid*, at para. 138.

evidence that revealed “cunning and coherent actions” both just before and immediately after the robbery and murder.

The applicant alleged that at the time when he stabbed his female victim sixteen times with his long knife, he did not know what happened after the first stab. In his words, “I just knew that the body got stab from me and I just froze for a while.” He further alleged that he had drank a lot of alcohol and smoked two marijuana cigarettes so that he was not in a position to appreciate that he was doing something where death or serious bodily harm was a virtual certainty.

Domestic court proceedings

On this evidence, the High Court of Barbados found the applicant guilty of murder and sentenced him to the mandatory death penalty, under section 2 of the OAPA. His appeal against conviction and sentence were dismissed by the Court of Appeal³⁶ in what the CCJ described as a “well researched”³⁷ and “correct”³⁸ judgment. An application for special leave to appeal from this decision to the CCJ was dismissed by the CCJ.

Inter-American Human Rights proceedings

The applicant next petitioned the Inter-American Commission which filed the matter with the Inter-American Court. In this way, the Court came to consider whether Barbados had violated the applicant’s right to a fair trial recognized under Article 8 of the American Convention in light of the fact that no detailed evaluation of his mental health had been made during his criminal trial.

³⁶ *Cadogan v R (No. 1)* (2006) 69 WIR 82.

³⁷ *Cadogan v R (No. 2)* (2006) 69 WIR 249, at para 4.

³⁸ *Ibid.*

In order to properly consider this allegation, the Court conducted an examination of the judicial proceedings which had taken place in the courts of Barbados. In doing so, the Inter-American Court made clear that it was not seeking to *review* the judgments of the domestic courts or of the CCJ. However, it was concerned with *whether the state had violated precepts* in the American Convention relating to a fair trial. As the courts were an arm of the state, it followed that in deciding whether the fair trial obligation had been violated that it *was* necessary to examine the respective domestic judicial proceedings to establish their compatibility with the American Convention.³⁹

IACHR

In deciding that Barbados had, in fact, breached Mr. Cadogan’s right under Article 8 of the American Convention, the Court found⁴⁰ that “the State failed to order that a psychiatric evaluation be carried out in order to determine, *inter alia*, the existence of a possible alcohol dependency or other „personality disorders“ that could have affected Mr. Da Costa Cadogan at the time of the offense, and it also failed to ensure that Mr. Da Costa Cadogan and his counsel were aware of the availability of a free, voluntary, and detailed mental health evaluation in order to prepare his defense in the trial.”⁴¹ Further, as Mr. Cadogan had been afforded state-appointed legal counsel, the presiding judge had the duty to adopt a more active role in “ensuring that all necessary measures were carried out in order to guarantee a fair trial.”⁴²

Orders

³⁹ *Da Costa Cadogan v Barbados*, IACHR, September 24, 2009. Series C No. 204, at para. 24.

⁴⁰ *Ibid*, at para. 90.

⁴¹ *Ibid*, at para. 88.

⁴² *Ibid*, at para. 89.

In its orders,⁴³ the Inter-American Court repeated that Barbados “shall adopt within a reasonable time” legislative amendment of section 2 of the OAPA and abolition of section 26 of the Constitution.⁴⁴ These prescriptions have now been accepted by Barbados in a consent order in proceedings before the CCJ in *Grazette v The Queen*.⁴⁵ Further, the Inter-American Court also prescribed procedures regarding medical examinations to be adopted in respect of persons accused of a crime whose sanction is the death penalty.

Relationship with Caribbean Constitutional Arrangements

The decisions and orders by the Inter-American Court in *Boyce and Joseph* and *Cadogan* raise issues of fundamental importance to Caribbean jurisprudence. Most conspicuously, these cases raise the question of whether the IAS can be reconciled with the doctrine of constitutional supremacy.

Constitutional Supremacy

Generations of Caribbean law students, attorneys, and judges have been weaned on the trite legal principle that the constitution is supreme. All of our constitutions carry *ex cathedra* statements of this supremacy. For example, section 1 of the Barbados Constitution states: “This Constitution is

⁴³ *Ibid*, at para. 128.

⁴⁴ *Ibid*: “the legislative or other measures necessary to ensure that the Constitution and laws of Barbados, particularly section 2 of the Offences against the Person Act and section 26 of the Constitution, are brought into compliance with the American Convention.” Another order required Barbados to “ensure that all persons accused of a crime whose sanction is the mandatory death penalty will be duly informed, at the initiation of the criminal proceedings against them, of their right to obtain a psychiatric evaluation carried out by a state employed psychiatrist.”

⁴⁵ [2009] CCJ 2 (AJ); CCJ Appeal No. CR 1 of 2009, 4th May, 2009 (Consent Order).

the supreme law of Barbados and ... if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Courts as Guardians of the Constitution

Within the first few years of adoption of the constitution, Caribbean courts had carved out for themselves the role of ultimate interpreters and guardians of the constitution. The most famous instance of this assertion is to be found in the case of *Collymore v Attorney-General of Trinidad and Tobago*,⁴⁶ where Wooding CJ said the following:

I am ... in no doubt that our Supreme Court has been constituted, and is, the guardian of the Constitution, so it is not only within its competence but also its right and duty to make binding declarations, if and whenever warranted, that an enactment passed by Parliament is *ultra vires* and therefore void and of no effect because it abrogates, abridges or infringes, or authorizes the abrogation, abridgment or infringement of one or more of the rights and freedoms recognized and declared by [the Constitution].

As the ultimate interpreters of the constitution and of the rights and freedoms that it enshrines, Caribbean courts have found and punished violations of the constitution by the executive,⁴⁷ by the legislature,⁴⁸ and by the courts themselves.⁴⁹ In this way, the courts have not only reinforced their

⁴⁶ (1967) 12 WIR 5, at p. 9.

⁴⁷ See *Hochoy v NUGE and Others* (1964) 7 WIR 174; *Hinds v R* (1975) 24 WIR 326; and *C.O. Williams Construction Ltd. v Blackman* (1994) 45 WIR 94.

⁴⁸ *Hinds v R* (1975) 24 WIR 326; *Independent Jamaica Council for Human Rights (1998) Ltd. v Marshall-Burnett* (2005) 65 WIR 268.

⁴⁹ *Maharaj v Attorney-General of Trinidad and Tobago (No. 1)* [1977] 1 All ER 411.

role as guardians of the constitution; they have also emphasized the status of the Constitution, to use Kelsenian terms, as the “grundnorm” of the domestic legal order.⁵⁰

(1) Reversal of grundnorm

The decisions by the Inter-American Court in the two cases just described would appear to represent a complete reversal of this understanding of nature of the Caribbean legal order. It is not merely, as in the days of *Hughes* and *Spence*, that the institutions of governance in the Caribbean have been persuaded by the jurisprudence of the Inter-American System of Human Rights. That is all well and good. However, the recent cases demonstrate that a much more seismic shift in the traditional understanding of our jurisprudence is underway.

From the perspective of the Inter-American Human Rights System, certainly from the perspective of the Inter-American Court, a much more fundamental issue is at stake. It is the issue of the *source of legitimacy* of human rights norms. The Court does not consider Caribbean constitutions, or the interpretation of those constitutions by a domestic court, be it the Privy Council or the CCJ, to be the final arbiter of human rights guaranteed under the constitutions. Rather, according to the Inter-American Court, the American Convention is supreme and it is the Inter-American Court’s decisions which present the definitive source of legitimacy for interpretations of meaning of human rights.

In short, for the Inter-American Court, the American Convention could be seen as the new “grundnorm” against which the legitimacy of the domestic legal system (including the constitution and its interpretation by domestic courts) is to be measured.

⁵⁰ *Mitchell v DPP* [1986] LRC 35.

Accordingly, as we have seen,⁵¹ the Inter-American Court has considered itself competent to order a member state of CARICOM to modify its statute law and repeal provisions in its constitution in order to ensure compliance with the Court's interpretation of the American Convention. I do not recall there being any discussion of the practical problems to which this gives rise where the impugned provision is entrenched and the government does not command the requisite parliamentary majority to secure the amendment or, more difficult still, where a referendum is required.

(2) Substantive criminal law; other substantive concepts of law

In *Cadogan*, the Inter-American Court appeared either unaware, or dismissive of substantive criminal law notions accepted in the Caribbean. For example, under Barbadian law, the defence of “diminished responsibility” requires proof of a kind of abnormality of mind. With respect to this defence, the drinking of alcohol or the smoking of two marijuana cigarettes before the commission of the crime is unlikely to suffice where there is evidence of “cunning and coherent actions” both just before and just after the crime takes place.

The issue is not now a question of whether the interpretation of the defence of “diminished responsibility” requires reconsideration by Barbadian policy-makers. It is, rather, the relatively cavalier manner in which accepted wisdom in substantive criminal law can be discarded by the IAS. It is not far-fetched to imagine that the Caribbean definition of such concepts as “insanity” and “provocation” in criminal law, as well as other notions in other areas of substantive law, will similarly be swept away for what the Inter-American Court regards as incompatibility with the American Convention.

⁵¹ *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169 and *Da Costa Cadogan v Barbados*, IACHR, September 24, 2009. Series C No. 204.

(3) The Inter-American Court and Caribbean Judiciary

The Inter-American Court made important pronouncements in relation to the Caribbean judiciary. In its view, the highest court, whether the Privy Council or the CCJ, has obligations under the American Convention in respect of Caribbean states that have accepted the Convention. In adjudicating on cases, the analysis of the highest court “should not ... [be] limited to the issue of whether the [domestic law is] unconstitutional. Rather, the question should have also [be] whether it [is] „conventional“. That is ... whether the law ... restricts or violates the rights recognized in the Convention.”⁵²

Again, I do not recall any discussion of the juridical basis upon which the highest court could properly undertake this task where the Convention though ratified, had not been incorporated into domestic law. The injunction also sits uncomfortably with the traditionally understood role of Caribbean courts as the ultimate and independent guardians of the interpretation of the fundamental rights and freedoms enshrined in Caribbean constitutions.⁵³

In other cases, the IAS has ordered new trials in circumstances where the highest domestic court has pronounced that the trial at first instance had been fair, and that the Court of Appeal had not erred in dismissing the appeal from conviction or sentence.⁵⁴ Although the Inter-American Court probably considers that it is competent to issue such an order which is to be obeyed by the “state” the fact of the matter is that an order to the executive does not necessarily translate into an order to the judiciary given the constitutional doctrine of separation of powers.

⁵² *Boyce et al v Barbados*, IACHR, November 20, 2007. Series C No. 169, at para. 78 (emphasis added).

⁵³ *Collimore v Attorney-General of Trinidad and Tobago* (1967) 12 WIR 5.

⁵⁴ This information was given by Mr. Ken Pantry, former DPP and current Dean of the Faculty of Law, University of Technology, at an IAS Seminar held at the Norman Manley Law School on Saturday, October 9, 2010, which was attended by the present writer. Cf. *Cadogan v R (No. 1)* (2006) 69 WIR 82; *Cadogan v R (No. 2)* (2006) 69 WIR 249; *Cadogan v Barbados*, IACHR, September 24, 2009. Series C No. 204.

(4) **Conflicting judicial edicts**

There is also the thoroughly unsatisfactory situation in which there appears to be conflicting edicts emanating from the highest domestic court and the Inter-American Court relating to the status of their respective rulings.

In *Briggs v Baptiste*,⁵⁵ the Privy Council reaffirmed the constitutional principle that international conventions do not alter domestic law except to the extent that they are incorporated into domestic law by legislation. Where the American Convention had not been incorporated, the recommendations of the Inter-American Commission and the orders of the Inter-American Court could not be directly applicable.

Where, however, orders of the IAS *do* become directly enforceable, whether by virtue of the doctrine of “legitimate expectation” or by virtue of legislative incorporation, the Privy Council’s position was that it was for the *national* courts to consider whether such orders were made within the limits of the jurisdiction conferred on the Inter-American Court by the American Convention. This is because, in the words of their Lordships:

The interpretation of the Constitution is a matter for the national courts, and its scope and effect in domestic law cannot be enlarged by orders of an international court made outside the terms of the Convention to which the Government ... assented. In determining such questions their lordships would expect the national courts to give great weight to the jurisprudence of the Inter-American Court, but they would be abdicating their duty if they were to adopt an interpretation of the Convention which they considered to be untenable.⁵⁶

⁵⁵ (1999) 55 WIR 460.

⁵⁶ *Briggs v Baptiste* (1999) 55 WIR 460 at p. 472.

This statement by the Privy Council of the role of national courts which is consistent, it will be remembered with the traditional understanding of Caribbean courts as guardians of the constitution, stands in stark contrast with the equally clear statement by the Inter-American Court of the role of those courts. In the view of the Inter-American Court, the domestic courts are obliged to give effect to the American Convention as purveyed by the Inter-American Court which remains the ultimate and most authoritative interpreter of the meaning and effect of the American Convention.

Conflicts of Legal Systems

There are clearly then, fundamental juridical tensions between the IAS on the one hand, and those Caribbean states that have accepted the American Convention and in particular the jurisdiction of the Inter-American Court, on the other. This is the challenge to which I alluded at the beginning of this lecture: to engage in the work necessary to produce the reconciliation of these two legal systems.

The theory of dualism

In pursuing this challenge let me warn against the temptation of having easy recourse to the orthodox theory of dualism. Dualism would suggest resolution by reference to the different “spheres” in which the two legal systems operate: the IAS operates in international law whereas Caribbean laws and courts operate in domestic law.

On this analysis, the approach by the Inter-American Court is entirely consistent with the classical statement of the relationship between international treaty law and domestic law. After all, Article 27 of the Vienna Convention on the Law of Treaties 1969 reminds us that a state may not invoke

the provisions of its internal law as a justification for its failure to perform a treaty. Internal law here includes statute law and the constitution. Moreover the “state” includes the domestic courts; thus what the IAS views as unacceptable judicial procedures, or an erroneous judicial interpretation of the constitution could in and of itself comprise a breach of international law.

Conveniently, the approach by domestic courts is also accommodated since the constitution remains supreme and its interpretation by domestic courts remains unassailable within the confines of the domestic sphere.

Bringing the law into disrepute

Whilst orthodox and seemingly attractive in its simplicity, it is submitted that the theory of dualism does not provide a satisfactory solution to our dilemma. First, any attempt to explain to the proverbial man in the street or on public transportation, that the Inter-American Court ordered his government to amend and repeal its laws, and that the government undertook to do so, but then chose not to do so on the basis of “dualism” is likely to bring the law into disrepute. Worse yet, to assert on the basis of the dualist theory, that a condemned man who won commutation of his death sentence under the IAS remains under the sentence of death under the domestic system, strains credibility and is clearly untenable.

Interpenetration of international and domestic law

Secondly, it is not altogether clear, even without incorporation, that the American Convention cannot have direct effect in domestic law. Where a litigant proves a legitimate expectation to rights in the American Convention ratified by his state, the CCJ decided in *Attorney-General v Joseph*

*and Boyce*⁵⁷ that those rights may, in certain circumstances, be enforceable in domestic law even where the Convention was not incorporated by legislation. Justice Wit expressed the view that treaties ratified by the state are *ipso facto* part and parcel of domestic law regardless of legislative implementation. Whether either or both of these avenues opens the door to making Inter-American Court orders “directly enforceable”⁵⁸ is yet to be confronted by Caribbean courts. What is clear is that it is no longer possible to contain international and domestic law within separate water-tight compartments.⁵⁹

The Caribbean Court of Justice as a Solution

With all due caution to self-interestedness, I would like to end by proffering the suggestion that a solution to the constitutional predicament posed by the impact of the Inter-American Human Rights System into Caribbean law may be found by considering the founding and mission of the CCJ. The unique nature of the CCJ combined with urgent developments underway to craft a CARICOM Human Rights treaty would appear to make redundant any necessity to have recourse to binding Inter-American Human Rights Tribunals although there is much to be said for retaining access to the recommendations of the Inter-American Commission and the advisories of the United Nations Human Rights Committees.

⁵⁷ (2006) 69 WIR 104.

⁵⁸ A possibility implicitly allowed by the Privy Council in *Briggs v Baptiste* (1999) 55 WIR 460.

⁵⁹ Note that in specific circumstances, Caribbean courts may be mandated by the constitution to have regard to relevant human rights conventions: *see e.g.*, Constitution of the Co-operative Republic of Guyana (Act No. 2 of 1980) sections 39, 40, 138, 154, and 212.

The Jurisdictions of Court

The Agreement Establishing the Caribbean Court of Justice (“CCJ Agreement”)⁶⁰ constituted the CCJ with two jurisdictions: the original and appellate jurisdictions. In its original jurisdiction the CCJ has compulsory and exclusive competence to determine disputes arising under the Revised Treaty of Chaguaramas (“Revised Treaty”) which establishes the Caribbean Community including the CARICOM Single Market and Economy (“CSME”). Original jurisdiction disputes have allowed the Court to pronounce⁶¹ on the competence of individuals to bring original jurisdiction proceedings against their own state, as well as other member states of the community. In these proceedings, the Court has also gone a far way in clarifying the issues of the rights under the Revised Treaty which may be enforceable by individuals; the administrative standards to be observed by the organs of the Community in their decision-making; and the evidence that must be produced to warrant the award of damages against member states and the community.⁶²

Whereas, each member state of the Community must and has subscribed to the original jurisdiction of the Court, acceptance of the appellate jurisdiction is *optional* and was originally intended to allow Commonwealth Caribbean member states to complete the process of their political independence by terminating appeals to Her Majesty’s Privy Council in London and vesting those appeals in the CCJ. But the CCJ Agreement allows *any* Contracting Party to opt to join the

⁶⁰ Agreement Establishing the Caribbean Court of Justice 2001 (entered into force 23 July 2002) (“CCJ Agreement”). The Court was formally inaugurated in Port of Spain, Trinidad and Tobago on 16 April 2005.

⁶¹ *TCL and Another v The Co-operative Republic of Guyana* (2009) 74 WIR 302.

⁶² *TCL and Another v The Co-operative Republic of Guyana (No. 2)* (2009) 75 WIR 327.

appellate jurisdiction and the non-Commonwealth member state of Suriname has already indicated its intention of doing so.⁶³

In the exercise of its appellate jurisdiction, the CCJ must apply the constitution of the member state as the supreme law of that member state. In so doing, the Court attempts as far as possible, to weld a common Caribbean jurisprudence based in the first place on the common characteristics of the Westminster model of government, and secondly on the implications of membership in a community governed by agreed treaty principles and institutions.

The Singularity of the Mission of the Court

The bifurcation of the twin jurisdictions of the Court has led to the assertion that the CCJ is both an international court (when discharging its original jurisdiction), and a domestic court (when exercising its appellate jurisdiction). This characterization is helpful in explaining, in graphical terms, the dual competences of the Court but it might be misleading in that it tends to mask the fact that the fundamental mission of the Court is singular. In a word, that mission is to define the Caribbean legal identity.

The fact that the Court is about the business of giving legal distinctiveness to a single entity, to wit, the Caribbean Community which exists within and among the member states, means that appellate and original jurisdictions cannot be and are not impervious to each other. This is illustrated, somewhat, by the referral obligation, now part of the domestic law in all member states

⁶³ See: Rinaldo Ronald Venetiaan, „Statement by His Excellency Rinaldo Ronald Venetiaan, President of the Republic of Suriname and Chairman of the Conference of Heads of Government of the Caribbean Community“ (Inauguration of the Caribbean Court of Justice, 16 April 2005 Trinidad and Tobago) available at <http://www.caribbeancourtsofjustice.org/inaguration_addresses/vintiaan.pdf> accessed on 19

October 2010; See also, „Statement by the Honourable Chandrikapersad Santokhi, Minister of Justice and Police of Suriname, to CARICOM Legal Affairs Committee, October 2005“ *Barbados Advocate* (Barbados, 6 October 2005), at p. 1; See further, Winston Anderson, „Is Joining the Appellate Jurisdiction of the CCJ an Option for Suriname?“ (2010) 35(1) WILJ 13, at pp. 14-15.

of the Community. The rule on referrals obliges national tribunals to refer issues arising in domestic litigation and involve a question concerning the interpretation or application of the Revised Treaty, to the original jurisdiction of the CCJ for determination.⁶⁴

CCJ and Human Rights

On the specific question of the protection of human rights, it is true that the regime of human rights is conspicuous by its absence from the Revised Treaty, but several matters may be pleaded in mitigation.

Preoccupation with Economic Growth

First, the absence of a human rights regime from the Revised Treaty is readily understood in the context of the time of the Treaty's drafting. At that time, the concern and emphasis coming out of the movement from the custom union to a free trade area and then to a single market and economy, was clearly economic development. But a community cannot live by economics alone. In order for it to survive and thrive, CARICOM must embrace the robust protection of human rights which on the liberal theory of western democracies reflected in Caribbean constitutions, is also fundamental to facilitating economic growth by private enterprise. This was given nascent recognition in the preamble of the Revised Treaty which recalled the Charter of Civil Society adopted by the Conference of Heads of Government on 19 February 1997, "reaffirming the human rights of their peoples."

⁶⁴ CCJ Agreement, Art. XIV; Revised Treaty, Art. 214.

Development of a CARICOM Human Rights Treaty

Second, Caribbean governments have noted that there is an “urgent need for a CARICOM Human Rights Treaty.”⁶⁵ Accordingly, efforts are now proceeding towards the regional promotion and protection of human rights; to developing “an indigenous Treaty that [represents] our unique issues and reflects [our] own culture while respecting the universal rights as they are outlined by the Universal Declaration on Human Rights and other international instruments.”⁶⁶ Such a treaty will, no doubt in similarity with the IAS, allow for complaints by individuals and non-governmental organizations of human rights abuses by member states, whether directly to the CCJ, or through some filtering mechanism similar to the Inter-American Commission. The CARICOM Human Rights Treaty is expected to build upon the 1997 Charter of Civil Society.

CCJ Jurisdiction in respect of Bills of Rights

Third, in the exercise of its appellate jurisdiction, the CCJ is charged with interpreting and applying the Bills of Rights contained in all Westminster model constitutions which themselves were inspired by and reflect international human rights declarations and treaties.⁶⁷ It is also possible that relevant issues may come before the court through the referral obligation to which I alluded earlier. In several cases, Caribbean courts have held that in the interpretation of the Bills of Rights recourse is properly to be had to the international instruments and to the cases decided

⁶⁵ Statement by Mia Mottley, Attorney General of Barbados quoted by Sheldon A. McDonald, „Consultancy to Conduct and Formulate the most Suitable Arrangements to provide for the Protection of Human Rights in the Caribbean (CARICOM)“ (Consultancy Report) (16 September 2005), at p.2.

⁶⁶ *Ibid.*

⁶⁷ American Declaration of the Rights and Duties of Man (adopted by the 9th International Conference of American States) 1948; The Universal Declaration of Human Rights (adopted and proclaimed by the UN General Assembly 10 December, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November, 1950).

under them.⁶⁸ Accordingly, the Court already has some of the tools it needs to assist in building a vibrant culture of human rights alongside and intertwined with the development of the CSME.

International Comparative Human Rights Law

The existence of a regional human rights treaty which is interpreted and applied by the CCJ would not close the door to the learning of the IAS. Far from it; as the ECCA judgments in *Spence* and *Hughes* illustrate, Caribbean courts in general and the CCJ in particular would do well to consider seriously the persuasive value of the recommendations by the Inter-American Commission and the rulings of the Inter-American Court. Being open to the learning of the IAS would provide an opportunity for evaluating and accepting, where appropriate, global human rights norms into Caribbean jurisprudence thereby enhancing and enriching the language and culture of Caribbean human rights discourse.⁶⁹

For similar reasons, it would seem to be both permissible and desirable to draw upon decisions of other regional and global human rights bodies, as well as decisions of supreme courts which grapple with these issues. The market-place of ideas, which is accessed through international comparative human rights law, provides an excellent opportunity to identify “best practices” and the most appropriate solution to specific problems coming before Caribbean courts. Already, at least one Caribbean constitution requires that the court, in adjudicating on human rights matters, “shall pay due regard” to all relevant international treaties, covenants and declarations on human rights.⁷⁰

⁶⁸ *R v Hughes* (2001) 60 WIR 156, ECCA decision per Sir Dennis Byron CJ at para 7.

⁶⁹ This turn of phrase derives from email correspondence from Ms Malene Alleyne, LLB, student at the Norman Manley Law School.

⁷⁰ See e.g., Constitution of the Co-operative Republic of Guyana, Act No. 2 of 1980, sections 39, 40, 138, 154, 212.

Conclusion

I hope I have said enough to indicate that at both the practical and philosophical levels significant work remains to be done to provide a clear and persuasive explanation of the moorings of our human rights law; the legal and moral basis of our governmental institutions with regard to human rights issues; and, in a word, of our Caribbean human rights jurisprudence.

I also hope I have said enough to interest you in the idea that in choosing an appropriate explanation for our human rights jurisprudence, some thought must be given to the place of the CCJ in defining the Caribbean legal identity. For, in the mandate of the CCJ Agreement, the CCJ is destined to play “a determinative role in the further development of Caribbean jurisprudence through the judicial process.”⁷¹

In other words, the ultimate responsibility for defining and guarding the Caribbean legal persona remains a matter for the Caribbean people and their jurists; an argument not at all that dissimilar to the one most appropriately advanced for repatriating appeals from the Her Majesty’s Privy Council in London to the CCJ in Port of Spain.

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⁷¹ CCJ Agreement, Preamble. See also, *The 5th Anniversary of the Caribbean Court of Justice* (2010, CCJ) stating the Mission of the Court: “The Caribbean Court of Justice shall perform to the highest standards as the supreme judicial organ in the Caribbean Community. In its original jurisdiction it ensures uniform interpretation and application of the Revised Treaty of Chaguaramas, thereby underpinning and advancing the CARICOM Single Market and Economy. As the final court of appeal for member states of the Caribbean Community it fosters the development of an indigenous Caribbean jurisprudence.”